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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 LOLITA SCHAGENE,

12
13 Plaintiff,

14 v.

15 RICHARD V. SPENCER, Secretary of
16 the Navy,

17 Defendant.

Case No.: 13cv333-WQH(RBB)

**ORDER GRANTING IN PART
DEFENDANT’S EX PARTE
APPLICATION FOR COURT
ORDER [ECF NO. 161]**

18 On January 4, 2018, Defendant Richard Spencer, the United States Secretary of the
19 Navy,¹ filed an Ex Parte Application for Court Order Ordering Joel Lazar, Ph.D. to
20 Release Psychological Records (the “Application for Court Order”) [ECF No. 161].
21 Plaintiff Lolita Schagene opposed Defendant’s Application for Court Order on
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24 ¹ Richard V. Spencer became Secretary of the Navy in August 2017, and is therefore substituted as
25 Defendant in this suit for former Secretary of the Navy, Raymond E. Mabus, Jr. See Fed. R. Civ. P.
26 25(d) (“An action does not abate when a public officer who is a party in an official capacity . . . ceases
27 to hold office while the action is pending. The officer’s successor is automatically substituted as a
28 party.”).

January 15, 2018 [ECF No. 164], and Defendant replied on January 22, 2018 [ECF No. 165]. For the reasons discussed below, Defendant’s Application for Court Order [ECF No. 161] is **GRANTED IN PART**.

I. FACTUAL BACKGROUND

On February 12, 2013, Schagene filed a Title VII hostile work environment action against her former employer, the Department of the Navy, which operates Fiddler’s Cove Marina and Recreational Vehicle Park at the Naval Base Coronado. (See Compl. 1-2, ECF No. 1.) Plaintiff had worked for Defendant for over seven years before she resigned on January 18, 2011. (Id. at 2, 4.) Schagene alleges that during her employment with Defendant, she was subjected to “numerous discriminatory and harassing” incidents.

(See id. at 4-5.)

[Schagene complains of] being sexually and physically harassed by Workman, Myers and other employees; threats of physical violence and sexual assault by supervisors and other workers; acts of intimidation, such as having a hose and a tire on her car punctured and being cornered and physically intimidated by male employees; inappropriate sexual misconduct and assault by male employees and supervisors; and being treated in a derogatory manner

(Id. at 5.) Plaintiff contends Defendant’s conduct was motivated by her gender, and Defendant retaliated after she complained about the conduct. (Id.)

[Schagene claims that she] suffered and continues to suffer loss of wages and other benefits of employment, severe and extreme physical and emotional distress including, but not limited to, severe anxiety, post-traumatic stress disorder (‘PTSD’), panic attacks, insomnia, nightmares and recurring intrusive thoughts about the incidents that occurred in the workplace, and exacerbation of her medical conditions.

(Id.) Plaintiff alleges causes of action for sex discrimination, sexual harassment, and retaliation. (Id. at 5-9.) She seeks compensatory damages, including lost earnings, leave time, retirement benefits, and privileges based on tenure, emotional distress damages, interest, attorney’s fees, and costs of suit. (Id. at 9.)

II. PROCEDURAL BACKGROUND

The Court issued a Case Management Order Regulating Discovery and Other Pretrial Proceedings on July 10, 2013. (Case Mgmt. Conference Order, ECF No. 10.) During the course of discovery, the Secretary of the Navy subpoenaed records from Schagene's treating psychiatrist, Joel D. Lazar, Ph.D. (Ex Parte Appl. Ct. Order 2, ECF No. 161.) On March 6, 2014, Plaintiff served Rule 26 Rebuttal Expert Witness Disclosure in which she designated Dr. Lazar and described his anticipated testimony as follows:

It is anticipated that Dr. Lazar will provide testimony to rebut or contradict the conclusions reached by Defendant's expert, Mark A. Kalish. Some of this testimony will concern rebutting Dr. Kalish's conclusions regarding Plaintiff's psychological condition; the psychological injury suffered by Plaintiff as a result of the alleged sexual harassment and the effect it had on Plaintiff's psychiatric condition; and Plaintiff's reliability and credibility as a witness.

Dr. Lazar's designation as a rebuttal witness does not in any way limit his ability to testify as a percipient treating physician as to his personal knowledge of the facts gained as Plaintiff's treating physician, independent of the litigation, and any opinions formed on the basis of such independently facts acquired and informed by his training, skill, and experience.

(Id. at 7-8.) The Secretary deposed Dr. Lazar on April 22 and 29, 2014, and obtained Schagene's updated records during the deposition. (Id. at 2; see also Opp'n 6 (declaration of McKellar), ECF No. 164.)

Before trial, Plaintiff filed a Motion in Limine seeking to preclude any evidence about her prior conviction or the charges that led to her conviction, and her mental health state in 1997–1998. (Pl.'s Trial Br. Attach. #3, Pl.'s Mot. in Lim. 1-3, ECF No. 105.) The court granted in part the motion and precluded the introduction of "any evidence" concerning Schagene's "1997–1998 charges, confinement, competency determination, or treatment without first obtaining leave of Court." (Order 3, Nov. 23, 2017, ECF No. 117.) The court denied without prejudice Plaintiff's motion to preclude the admission of "any evidence" regarding her "mental health state in 1997–1998." (Id.)

1 The trial was held in December 2015, and the jury rendered a verdict in favor of
2 the Secretary of the Navy [ECF Nos. 129-30, 134-35]. Plaintiff appealed, and on
3 August 22, 2017, the Ninth Circuit Court of Appeals reversed the judgment. Schagene v.
4 Mabus, 704 F. App'x 671, 673 (9th Cir. 2017). The appellate court found that the
5 district court erred by allowing Defendant's designated expert, Dr. Kalish, to testify about
6 Schagene's mental health based in part on her mental health records from 1997–98,
7 without obtaining leave of the court. Id. It also concluded that the trial court erred by
8 permitting Defendant to cross-examine Dr. Lazar about Plaintiff's loss of the custody of
9 her children following her 1997 arrest. Id. The Ninth Circuit reasoned that because the
10 events giving rise to this action occurred during the period of 2004–2011, “testimony
11 about Schagene's mental health diagnoses, medication, and symptoms in 1997–1998
12 could not show that it was any more or less probable that Schagene could accurately
13 perceive and tell the truth during the timeframe of the events alleged[,]” and the high risk
14 of prejudice substantially outweighed its probative value. Id. Similarly, the appellate
15 court found that evidence that Plaintiff lost custody of her children following her arrest in
16 1997 was inadmissible because its prejudicial effect substantially outweighed its
17 probative value. Id.

18 After remand, United States District Judge William Q. Hayes held a pretrial
19 conference on November 28, 2017 [ECF No 160]. During the conference, Defendant
20 asked Plaintiff to update her “medical psychological records” and employment
21 information; and the Court directed the parties to meet and confer, and to file a motion if
22 the issue could not be resolved. (Opp'n 6 (declaration of McKellar), ECF No. 164; see
23 also Pretrial Conference Tr. 4-6, Nov. 28, 2017, ECF No. 166.) On December 5, 2017,
24 the Secretary of the Navy served three interrogatories on Schagene. (Ex Parte Appl. Ct.
25 Order 3, ECF No. 161.) The parties attempted to negotiate the scope of additional
26 discovery but were not able to reach an agreement. (See id. at 3-4; Opp'n 3, ECF No.
27 164; Reply 1-2, ECF No. 165.) On January 4, 2018, Defendant filed the Application for
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1 Court Order, which District Judge Hayes referred to this Court. (Order, Jan. 25, 2018,
2 ECF No. 167.)

3 **III. LEGAL STANDARD**

4 The district court has discretion to reopen discovery on remand. See King v.
5 GEICO Indem. Co., __F. App'x__, 2017 WL 5256243, at *2 (9th Cir. Nov. 13, 2017)
6 (“A district court’s determination regarding whether to . . . reopen discovery is reviewed
7 for abuse of discretion.”); see also Millenkamp v. Davisco Foods Int’l, Inc., No. CV03–
8 439–S–EJL, 2009 WL 3430180, at *3 (D. Idaho Oct. 22, 2009) (noting that the appellate
9 court did not remand the case with directions that the trial court take additional evidence
10 or allow further discovery; therefore, whether to reopen discovery was left to the
11 discretion of the trial court). But “a remand is not typically intended to allow a party to
12 fill in the gaps from the original record.” Millenkamp, 2009 WL 3430180, at *3 (citing
13 Rochez Bros., Inc. v. Rhoades, 527 F.2d 891, 894 (3d Cir. 1975)).

14 Rule 16(b)(4) of the Federal Rules of Civil Procedure states that “[a case
15 management] schedule may be modified only for good cause and with the judge’s
16 consent.” Fed. R. Civ. P. 16(b)(4); see also Singleton v. Hedgepath, No. 1:08–cv–
17 00095–AWI–GSA–PC, 2015 WL 1893982, at *1, *5 (E.D. Cal. Apr. 24, 2015)
18 (analyzing a request to reopen discovery after remand under Rule 16 of the Federal Rules
19 of Civil Procedure); Rodriguez v. Gen. Dynamics Armament & Tech. Prods., Inc., Civil
20 No. 08–00189 SOM/LSC, 2013 WL 4603057, at *3 (D. Haw. Aug. 29, 2013) (finding
21 that Rule 16 of the Federal Rules of Civil Procedure governed the motion to reopen
22 discovery after remand; reasoning that a request “to reopen discovery after the discovery
23 cutoff” was “a request for an extension[]”).

24 The Ninth Circuit has instructed trial courts to consider the following factors in
25 determining whether to amend a Rule 16 scheduling order to reopen discovery:

26 1) whether trial is imminent, 2) whether the request is opposed, 3) whether
27 the non-moving party would be prejudiced, 4) whether the moving party was
28 diligent in obtaining discovery within the guidelines established by the court,

1 5) the foreseeability of the need for additional discovery in light of the time
2 allowed for discovery by the district court, and 6) the likelihood that the
3 discovery will lead to relevant evidence.

4 City of Pomona v. SQM N. Am. Corp., 866 F.3d 1060, 1066 (9th Cir. 2017) (citation
5 omitted). The Rule 16 good cause standard focuses on the “reasonable diligence” of the
6 moving party. See Noyes v. Kelly Servs., 488 F.3d 1163, 1174 n.6 (9th Cir. 2007); see
7 also Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95 (9th Cir. 2000) (stating that
8 Rule 16(b) scheduling order may be modified for “good cause” based primarily on the
9 diligence of moving party).

10 “Absent the reopening of discovery . . . a party may still be required to update
11 discovery materials after the deadline” pursuant to Federal Rule of Civil Procedure 26(e).
12 See Holiday Resales, Inc. v. Hartford Cas. Ins. Co., CASE NO. 2:07-cv-01321-JLR, 2008
13 WL 11343449, at *2 (W.D. Wash. Oct. 2, 2008) (denying plaintiff’s motion to reopen
14 discovery but directing plaintiff, pursuant to Rule 26(e)(2), to file a supplemental
15 damages report thirty days before the trial). A party who has made an initial disclosure
16 under Rule 26(a) or responded to an interrogatory or request for production may be is
17 required to “supplement or correct its disclosure or response.” Fed. R. Civ. P. 26(e)(1).
18 It must do so “in a timely manner if the party learns that in some material respect the
19 disclosure or response is incomplete or incorrect, and if the additional or corrective
20 information has not otherwise been made known to the other parties during the discovery
21 process or in writing.” Id. 26(e)(1)(A). Likewise, a party is required to supplement its
22 expert witness’ report. See id. 26(e)(2). “For an expert whose report must be disclosed
23 under Rule 26(a)(2)(B), the party’s duty to supplement extends both to information
24 included in the report and to information given during the expert’s deposition.” Id. The
25 Federal Rules of Civil Procedure prescribe timely disclosures. “Any additions or changes
26 to this information must be disclosed by the time the party’s pretrial disclosures under
27 Rule 26(a)(3) are due.” Id. The duty to disclose is a “continuing duty,” and a party that
28 “fails to provide information or identify a witness as required by Rule 26(a) or (e), . . . is

1 not allowed to use that information or witness to supply evidence on a motion, at a
2 hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R.
3 Civ. P. 37(c)(1); see also Fourth Inv. LP v. United States, No. 08cv110 BTM (BLM),
4 2010 WL 2196107, at *1 (S.D. Cal. June 1, 2010) (citing Fed. R. Civ. P. 26(e); Hoffman
5 v. Constr. Protective Servs., Inc., 541 F.3d 1175, 1179 (9th Cir. 2008)).

6 **IV. DISCUSSION**

7 Defendant seeks an order requiring (1) Dr. Lazar to produce Plaintiff’s records
8 from March 31, 2014, to the present, and (2) Plaintiff to respond to the three
9 interrogatories Defendant propounded on December 5, 2017. (See Ex Parte Appl. Ct.
10 Order 1, 4-5, ECF No. 161; Reply 4, ECF No. 165.) The Secretary of the Navy claims
11 that Schagene’s treatment with Dr. Lazar and other medical care providers is relevant to
12 her alleged emotional distress damages, and Schagene’s delusional disorder diagnosis
13 impacts her credibility. (Ex Parte Appl. Ct. Order 1-3, ECF No. 161.) Defendant also
14 maintains that Plaintiff’s suggestion that post-trial discovery be limited because she is
15 represented by pro bono counsel is not a sufficient reason to deny the requested
16 discovery. (Reply 2-4, ECF No. 165.)

17 Schagene argues in her opposition that discovery is closed and the Defendant did
18 not seek leave to reopen discovery. (See Opp’n 2-3, ECF No. 164.) Plaintiff contends
19 that Defendant failed to establish good cause to reopen discovery because he neither
20 explained why the disputed records are relevant nor how he seeks to utilize the records at
21 trial. (Id. at 2-4.) Schagene’s counsel argues that her “appointment by the pro bono
22 panel does not generally encompass a large amount [of] potentially expensive and
23 voluminous pre-trial discovery such as expert depositions.” (Id. at 4.) Additionally,
24 Plaintiff claims that while her “updated therapy records may be relevant to a new trial,”
25 records concerning all of her medical care providers and pharmacies where she filled her
26 prescriptions are not relevant. (Id.)

1 As an initial matter, the Court addresses Schagene's contention that discovery is
2 closed and the Defendant did not seek leave to reopen discovery. (See Opp'n 2-3, ECF
3 No. 164.) The Plaintiff states, "The Court directed the parties to meet and confer on the
4 matter and to submit a written motion to the Court if the parties could not agree." (Id. at
5 3.) The Defendant, however, assumes that Judge Hayes authorized defense counsel to
6 obtain some post-remand discovery. (See Ex Parte Appl. Ct. Order 3, ECF No. 161.)

7 Defense counsel then received permission from the Court to file the Joint
8 Motion relating to Dr. Lazar's records directly with Judge Hayes, and to
9 serve limited interrogatories on Plaintiff asking the identity of any additional
10 mental health care providers with whom she has treated since the last trial,
and the identity of any additional employers with whom she has worked.

11 (Id.) The Court advised the parties, "When I get the joint status report or discovery, if it
12 appears that . . . you can't agree on it or there is some dispute, then I will likely send it
13 down to Judge Brooks to resolve any discovery issues." (Pretrial Conference Tr. 5-6,
14 Nov. 28, 2017, ECF No. 166.)

15 In his Ex Parte Application and subsequent Reply Brief, the Secretary of the Navy
16 does not cite any case authority addressing the standard for reopening discovery and
17 determining its scope. Although he does not ask to "reopen" discovery, the Defendant
18 "seeks permission from the Court to serve an Order on Dr. Lazar, Plaintiff's treater and
19 expert witness, requiring his production of updated records relating to the Plaintiff." (Ex
20 Parte Appl. Ct. Order 4, ECF No. 161.)

21 The Court construes Defendant's Ex Parte Application as a motion to reopen
22 discovery. Whether to reopen discovery is a matter of discretion. See King, __F.
23 App'x__, 2017 WL 5256243, at *2. The factors considered by courts in determining
24 whether to amend a scheduling order weigh in favor of reopening discovery. See City of
25 Pomona, 866 F.3d at 1066. The pretrial conference is set for June 15, 2018, and the trial
26 has not yet been scheduled. (See Order Granting Mot. Continue Pretrial Conference 1,
27 ECF No. 169.) Further, Schagene "is willing to stipulate" to the release of Dr. Lazar's
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1 updated records, although she objects to the broad reopening of discovery. (See Opp’n 2,
2 ECF No. 164.)

3 Although Schagene will suffer some prejudice if discovery is reopened, the limited
4 discovery requested by the Secretary of the Navy, further narrowed by the Court below,
5 seeks relevant information without which the Secretary may not meaningfully assess
6 Schagene’s current mental state and her alleged damages, and try the case. See
7 Singleton, 2015 WL 1893982, at *5 (allowing limited discovery on remand; reasoning
8 that although the party resisting discovery would “certainly suffer some prejudice if
9 discovery is reopened[,]” the party seeking discovery must be allowed discovery it is
10 entitled to under the Federal Rules of Civil Procedure).

11 Notably, the evidence on Defendant’s diligence in obtaining discovery is sparse;
12 after the Court issued its Case Management Scheduling Order, Defendant timely
13 propounded discovery requests and deposed Dr. Lazar in 2014. (See Ex Parte Appl. Ct.
14 Order 2, ECF No. 161; Reply 2, ECF No. 165.) The Defendant indicates that in April of
15 2014, he deposed Dr. Lazar, who was designated as Plaintiff’s rebuttal expert witness,
16 and received updated medical records for the Plaintiff. (See Ex Parte Appl. Ct. Order 7-
17 8, ECF No. 161.) But his Ex Parte Application does not show that the Secretary of the
18 Navy sought to reopen discovery before the delayed trial, which took place in December
19 of 2015. The Defendant urges that Dr. Lazar “provided new opinions while on the stand
20 that differed from some of the opinions he expressed in his medical records and during
21 his deposition.” (Id. at 2.) Defendant Spenser now seeks updated medical records for the
22 time period March 31, 2014, through the present, (id. at 2-3 (emphasis added)), and
23 answers to three interrogatories relating to treating medical providers, filled prescriptions,
24 and Plaintiff’s employment from January 1, 2014, to the present, (Reply 12-13, ECF No.
25 165 (emphasis added)). Defendant’s efforts to obtain post-trial discovery are discussed in
26 some detail. (See Ex Parte Appl. Ct. Order 2-4, ECF No. 161.) The Defendant made
27 some efforts to obtain this type of discovery before the first trial and was diligent in
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1 seeking to obtain post-trial discovery. On balance, the diligence showing is satisfied for
2 both periods, the time preceding the first trial and since.

3 Finally, although Defendant states that it may seek leave to obtain additional
4 records from other medical providers after reviewing Dr. Lazar's updated records or
5 Plaintiff's interrogatory responses, (see Reply 4, ECF No. 165), the Court declines to
6 issue a ruling regarding any additional discovery based on mere speculation (see Master,
7 Ltd. v. Zobmondo Entm't, LLC, Case Nos. CV 06-3459, CV 07-0571 ABC (PLAx),
8 2011 WL 13124102, at *4 (C.D. Cal. Feb. 8, 2011) ("This [post-remand discovery] was
9 not a chance to conduct discovery as if 'this litigation [was] starting over.'" (alteration in
10 original)). Having considered the City of Pomona factors, the Court finds good cause to
11 modify the scheduling order, and reopens limited discovery, as described below. See
12 City of Pomona, 866 F.3d at 1066.

13 **A. Dr. Lazar's Records**

14 Defendant asks the Court to order Dr. Lazar to produce Plaintiff's medical records
15 from March 31, 2014, to the present. (See Ex Parte Appl. Ct. Order 4-5, ECF No. 161;
16 Reply 4, ECF No. 165.) The Secretary of the Navy claims that the records cover the
17 period after Dr. Lazar's deposition and are relevant because Dr. Lazar has treated
18 Schagene for delusional disorder and schizophrenia for many years, Schagene put her
19 emotional distress at issue, and Schagene's delusional disorder diagnosis affects her
20 credibility at trial. (See Ex Parte Appl. Ct. Order 1, 3, ECF No. 161; Reply 2, ECF No.
21 165.) Defendant further argues that Plaintiff's counsel "is confusing the nature of Dr.
22 Lazar's involvement" in the case, as evidenced by the counsel's statement that "Plaintiff
23 will produce a report setting forth any new opinions formed by Dr. Lazar" (Reply 3,
24 ECF No. 165.) Defendant Spencer maintains that Dr. Lazar is not a formally retained
25 expert; rather, he is Schagene's treating physician who has not been designated as a
26 retained expert and has not produced an expert report under Rule 26 of the Federal Rules
27 of Civil Procedure, and is now precluded from doing so. (Id. But see Ex Parte Appl. Ct.
28 Order 7-8, ECF No. 161 (designating rebuttal witness).) The Secretary of the Navy

1 offers that his designated medical expert, Dr. Kalish, would deliver an updated expert
2 report within two weeks of receiving Dr. Lazar's updated records, and offers to make Dr.
3 Kalish available for deposition. (Reply 3-4, ECF No. 165.)

4 Plaintiff acknowledges that her "updated therapy records may be relevant to a new
5 trial" and states that "[she] is willing to stipulate to the release of Dr. Joel Lazar's
6 records" (See Opp'n 2, 4, ECF No. 164.) Schagene asserts that if the Secretary
7 provides the updated medical records to his designated expert, Dr. Kalish, she should be
8 provided Dr. Kalish's amended expert report and be able to depose him "on how the
9 records amended or affirmed his opinions and why." (*Id.* at 4.) Plaintiff also offers to
10 "produce a report setting forth any new opinions formed by Dr. Lazar during the time
11 period which the records cover at the same time that Dr. Kalish produces his report." (*Id.*
12 at 5.)

13 Schagene alleges in her Complaint that she "suffered and continues to suffer . . .
14 severe and extreme" emotional distress, including "severe anxiety, post-traumatic
15 stress disorder ('PTSD'), panic attacks, insomnia, nightmares and recurring intrusive
16 thoughts about the incidents that occurred in the workplace," and seeks emotional
17 distress damages. (See Compl. 5, 9, ECF No. 1 (emphasis added).) Dr. Lazar is
18 Plaintiff's treating psychiatrist who last provided treatment records concerning Plaintiff
19 during his April 2014 deposition. (See Ex Parte Appl. Ct. Order 2, ECF No. 161.) In
20 light of Schagene's Complaint allegations, requested damages, and past diagnoses of
21 delusional disorder and schizophrenia, the Secretary's request seeks relevant information.
22 Further, the request for Dr. Lazar's updated records is limited to the time period after his
23 deposition.

24 The Court **GRANTS** Defendant's request. Plaintiff is **ORDERED** to produce her
25 psychological records generated by Dr. Lazar from March 31, 2014, to the present, by
26 **March 22, 2018**. If after reviewing the updated records, the Defendant's designated
27 medical expert, Dr. Kalish, issues an amended expert report, he must do so by **April 5,**
28 **2018**. See Rios v. Wal-Mart Stores, Inc., No. 2:11-cv-01592-APG-GWF, 2014 WL

1 1413639, at *6 (D. Nev. Apr. 11, 2014) (“Both parties are also entitled to obtain updated
2 expert medical opinions regarding to what extent, if any, the condition of Plaintiff’s
3 lumbar spine following pregnancy and childbirth can reasonably be attributed to injuries
4 caused by the . . . accident, rather than to her underlying and pre-existing degenerative
5 conditions.”). Further, because Dr. Lazar is Plaintiff’s treating psychologist who has not
6 been designated as a retained medical expert, the Court is not ordering Dr. Lazar to
7 produce an expert report. The parties may depose Dr. Lazar and Dr. Kalish, by **April 19,**
8 **2018.** See id. (allowing a deposition of plaintiff’s treating physician on remand). The
9 depositions are limited to the issues and time frames specified in this order.

10 **B. Defendant’s Interrogatories**

11 Defendant’s interrogatories seek information from January 1, 2014, to the present,
12 regarding (1) all medical and mental health care practitioners who have treated Plaintiff,
13 (2) all pharmacies that have filled Plaintiff’s prescription medications, and (3) all
14 Plaintiff’s employers. (See Reply 12-13, ECF No. 165.) The Secretary of the Navy
15 claims that Schagene has neither responded nor objected to the interrogatories. (Id. at 2.)
16 Defendant contends that he seeks relevant information and would be “severely
17 prejudiced” if he proceeds to trial without the requested information. (Id.) Schagene
18 states in her opposition that Defendant Spencer served the interrogatories without
19 obtaining leave of court and argues that the interrogatories are overbroad. (See Opp’n 3-
20 4, ECF No. 164.)

21 **1. Interrogatory number one**

22 Defendant’s interrogatory one seeks the following:

23 Other than Joel Lazar, Ph.D., identify all medical and mental health care
24 practitioners with whom you have treated from January 1, 2014 to the
25 present, including medical doctors, psychiatrists, psychologists, counselors
26 and therapists. For each such provider identified, provide the name, current
27 address, telephone number, and the dates you treated with each individual
28 provider.

1 (Reply 12, ECF No. 165.) Schagene has not formally responded to the interrogatory, but
2 on January 4, 2018, her counsel advised defense counsel in an e-mail that Schagene
3 “[had] not seen any other psychiatrist, counselor, or psychologist other than [Dr. Lazar]
4 since trial.” (*Id.* at 9.) Plaintiff’s counsel further stated that the request for all medical
5 records was overbroad, but noted that “[i]f Dr. Lazar’s records reveal that there is a
6 medical issue that is contributing to [Plaintiff’s] emotional distress, we will provide
7 medical records associated with that issue.” (*Id.*)

8 Defendant does not explain why he seeks information dating back to January 1,
9 2014, almost two years before Plaintiff’s December 2015 trial; and the Court finds the
10 request to be overbroad and limits the time period to December 1, 2015, through the
11 present. (*See* Ex Parte Appl. Ct. Order 1-5, ECF No. 161; Reply 1-4, ECF No. 165.) As
12 discussed above, Plaintiff alleges in her Complaint that she “suffered and continues to
13 suffer . . . severe and extreme” emotional distress, and seeks emotional distress
14 damages. (*See* Compl. 5, 9, ECF No. 1) (emphasis added). Accordingly, the portion of
15 the interrogatory requesting the identification of mental health care providers who have
16 treated Schagene since December 1, 2015, seeks relevant information. *See Carnell*
17 *Constr. Corp. v. Danville Redev. & Hous. Auth.*, Civil Action No. 4:10-cv-00007, 2015
18 WL 2451223, at *4 (W.D. Va. May 22, 2015) (granting motion to conduct discovery on
19 remand) (“[I]ssues regarding [plaintiff’s] continued damages, . . . are highly relevant and
20 necessary for a full presentation and vigorous testing of [plaintiff’s] claims for
21 damages.”)).

22 The Secretary of the Navy also asks Schagene to identify “all medical care
23 practitioners” who have treated her during the requested time period, but does not provide
24 any justification or legal authority for the request. (*See* Ex Parte Appl. Ct. Order 3, ECF
25 No. 161; Reply 12, ECF No. 165.) At this stage of the proceedings, the request is
26 overbroad and not proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1)
27 (allowing discovery relevant to any claim or defense and proportional to the needs of the
28 case); *see also Singleton v. Lopez*, 1:08-cv-00095-AWI-EPG, 2015 WL 6697916, at *1,

1 *3-4 (E.D. Cal. Nov. 2, 2015) (considering the scope of permissible discovery after the
2 appellate court reversed the trial court's grant of summary judgment on the deliberate
3 indifference to back and eye pain, and swelling claims; allowing limited discovery into
4 records from medical care providers who had treated plaintiff's back and eye conditions,
5 but not blood condition) (emphasis added); Barnard v. Las Vegas Metro. Police Dep't,
6 No. 2:03-CV-01524-RCJ-(LRL), 2010 WL 1815410, at *2 (D. Nev. Apr. 30, 2010)
7 ("More information regarding ongoing medical conditions can always be gained by
8 conducting more and more discovery as time goes on, but at some point the trial must be
9 held."). The Court therefore modifies interrogatory number one as follows: "Other than
10 Joel Lazar, Ph.D., identify all mental health care practitioners and medical providers who
11 have addressed your mental health, with whom you have treated from December 1, 2015,
12 to the present, including medical doctors, psychiatrists, psychologists, counselors and
13 therapists. For each such provider identified, provide the name, current address,
14 telephone number, and the dates you treated with each individual provider."

15 Plaintiff's counsel's January 4, 2018 e-mail to defense counsel indicates that Dr.
16 Lazar is the only mental health care provider who has treated Plaintiff since the trial.
17 (See Reply 9, ECF No. 165.) If the representation is accurate, Schagene should state so
18 under oath. See 7 James Wm. Moore, et al., Moore's Federal Practice, § 34.13[2][a], at
19 34-57 (3d ed. 2017) (providing that when a party responds to a document request with an
20 answer, as opposed to production or an objection, the party must answer under oath)
21 (footnote omitted). The Court therefore **GRANTS IN PART** the Defendant Spencer's
22 motion to compel response to interrogatory one and **ORDERS** Schagene to respond to
23 the interrogatory, as modified by the Court. See Carnell Constr. Corp., 2015 WL
24 2451223, at *2 (citing MercExch., L.L.C. v. eBay, Inc., 467 F. Supp. 2d 608, 611-12
25 (E.D. Va. 2006)) ("[W]here the relief sought on remand requires a consideration of facts
26 as they exist at the time of remand and not as they existed several years in the past, then
27 discovery to update and determine facts as of the relevant date may be appropriate.");
28 Rios, 2014 WL 1413639, at *6-7 (citing Abila v. United States, No. 2:09-cv-01345-

1 KJD–VCF, 2013 WL 486973 (D. Nev. Feb. 6, 2013)) (reopening limited discovery to
2 assess plaintiff’s “current lumbar spine condition, treatment needs and prognosis, and the
3 extent to which these matters are attributable to the injuries” plaintiff sustained in the
4 underlying accident) (emphasis added).

5 **2. Interrogatory number two**

6 Interrogatory two requests Plaintiff to “[p]rovide the name, address and telephone
7 number for each pharmacy in which you have filled prescription medications from
8 January 1, 2014 to the present.” (Reply 12, ECF No. 165.) Schagene has not responded
9 to the interrogatory. (See Opp’n, ECF No. 164.)

10 For the same reasons stated above, the portion of the interrogatory seeking the
11 identification of all pharmacies in which Plaintiff has filled all of her prescriptions
12 for the period dating back to January 1, 2014, seeks irrelevant information, and is
13 overbroad and not proportional to the needs of the case. See Fed. R. Civ. P. 26(b)(1)
14 (allowing discovery relevant to any claim or defense and proportional to the needs of the
15 case). The Court modifies the interrogatory to seek “the name, address and telephone
16 number for each pharmacy in which you have filled prescription medications associated
17 with your mental health condition from December 1, 2015, to the present.” Accordingly,
18 the motion to compel response to interrogatory number two is **GRANTED IN PART**,
19 and Schagene is **ORDERED** to respond to the interrogatory, as modified by the Court.

20 **3. Interrogatory number three**

21 Interrogatory three asks Plaintiff to “[i]dentify employers for whom you have
22 worked from January 1, 2014 to the present. For each such employer identified, provide
23 the name, current address, telephone number, and the dates you worked for each
24 employer.” (Reply 13, ECF No. 165.) Schagene has not formally responded to the
25 interrogatory, but her counsel stated in the January 4, 2018 e-mail to defense counsel that
26 Schagene “has not been employed since the time of the last trial.” (See id. at 9.)

27 Plaintiff alleges in her Complaint that she “suffered and continues to suffer
28 loss of wages and other benefits of employment,” and seeks damages for lost earnings,

1 leave time, retirement benefits, and privileges based on tenure. (See Compl. 5, 9, ECF
2 No. 1 (emphasis added).) In light of the allegations in the Complaint, the requested
3 information is relevant. See Carnell Constr. Corp., 2015 WL 2451223, at *4 (“[I]ssues
4 regarding [plaintiff’s] continued damages, and especially [plaintiff’s] efforts to
5 mitigate . . . , are highly relevant”). As discussed above, the requested period dating
6 back to January 1, 2014, is overbroad. The Court therefore modifies the interrogatory to
7 state the following: “Identify employers for whom you have worked from December 1,
8 2015, to the present. For each such employer identified, provide the name, current
9 address, telephone number, and the dates you worked for each employer.”

10 Plaintiff’s counsel’s January 4, 2018 e-mail indicates that Plaintiff has not been
11 employed since the date of her trial. (See Reply 9, ECF No. 165.) The statement,
12 however, was not made under oath, and Schagene should provide a verified response.
13 See 7 James Wm. Moore, et al., Moore’s Federal Practice, § 34.13[2][a], at 34-57
14 (providing that when a party responds to a document request with an answer, as opposed
15 to production or an objection, the party must answer under oath) (footnote omitted). The
16 Court therefore **GRANTS IN PART** the Navy’s motion to compel Schagene to respond
17 to interrogatory number three, as modified by the Court.

18 **V. CONCLUSION**

19 For the reasons set forth above, the Court enters the following **ORDERS**:

20 Defendant’s Ex Parte Application for Court Order [ECF No. 161] is **GRANTED**
21 **IN PART**.

22 1) Plaintiff is **ORDERED** to produce her psychological records generated by Dr.
23 Lazar from March 31, 2014, to the present, by **March 22, 2018**. If after reviewing the
24 updated records Defendant’s designated medical expert, Dr. Kalish, issues an amended
25 expert report, he must do so by **April 5, 2018**. The parties may depose Dr. Lazar and Dr.
26 Kalish, by **April 19, 2018**. The depositions are limited to the issues and time frames
27 specified in this order; and
28

1 2) Schagene is **ORDERED** to respond to Defendant Spencer's interrogatories one
2 through three, as modified by the Court, by **March 22, 2018**.

3 **IT IS SO ORDERED.**

4 Dated: March 8, 2018



Hon. Ruben B. Brooks

United States Magistrate Judge